APPENDIX A

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1964 Monday, May 18, 1964

Case No. 33,111

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, *et al., Appellants,*

v.

DADE COUNTY, a political subdivision of the State of Florida, *et al., Appellees.*

This cause coming on for hearing and consideration of the Court, it now appears to the Court that no jurisdiction is vested in this Court to consider and determine the cause; it is therefore ordered that the appeal which was entered in this cause in the District Court of Appeal, Third District of Florida, on December 9, 1963, be and the same is hereby dismissed.

(SEAL)

A True Copy

TEST:

GUYTE P. MCCORD
Clerk Supreme Court.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

July Term, A.D. 1963

Case No. 62-137

DADE COUNTY, a political subdivision of the State of Florida, *et al.*, *Appellants*,

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, *et al.*, *Appellees*.

Case No. 62-639

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, *et al.*, *Appellants*,

v.

DADE COUNTY, a political subdivision of the State of Florida, *et al.*, *Appellees*.

Opinion filed November 1, 1963.

Appeals from Circuit Court for Dade County, Joe Eaton, Judge.

Darrey A. Davis, County Attorney, for Dade County.

Cowart, Dollar & Glassford, Mozart G. Ratner (Washington, D. C.), for Amalgamated Association.

Before HORTON, PEARSON and HENDRY, JJ.

PER CURIAM.

We here review two appeals from the same final decree.[1]

[1] It should be noted that appeal 62-639 was originally filed in the Supreme Court. Appeal 62-137 was filed here and was held in abeyance pending ruling in the Supreme Court on the jurisdiction of that Court. Subsequently appeal 62-639 was transferred to this Court and then the two appeals were consolidated by order of this Court.

The cause was initiated in the Circuit Court by a complaint for declaratory decree in which Dade County and the Metropolitan Dade County Transit Authority (a governmental entity of Dade County) sought judicial determination of the status of the County as related to the Amalgamated Association of Street, Electric Railway and Motor Coach Employees in the operation of the Transit Authority.

The final decree declared the rights of the parties as follows:

> "1. From the testimony presented and the documentary evidence presented, this Court finds that in the event the plaintiffs take over the public utility (pursuant to contract in evidence in this cause) now owned and operated by private person, firm or corporation, said person, firm or corporation will maintain, based upon circumstances presently reflected by this record, a substantial financial or operating control. Therefore, the defendant union and its members are excluded from the operation of F.S. 839.221 (and the plaintiffs are not barred from employing the membership of the defendant union).
>
> "2. Plaintiffs are not required by law to offer employment to the members of the defendant union, and the members of the defendant union would not by operation of law (Sub-Section (4) of F.S. 839.221) be included in classified Civil Service and other benefit provisions and systems of Metropolitan Dade County, Florida, upon consummation of the contractual transaction evidenced by the record in this cause.
>
> "3. Plaintiffs are not authorized by law to enter into a collective bargaining agreement with defendants and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.

"4. Plaintiffs are not authorized to recognize as lawful any strike directed against them and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause."

Dade County and the Transit Authority appeal from certain portions of the resultant decree, while the bus operators' union appeals from others. The facts giving rise to the issues here involved are complex and lengthy, but must of necessity be set forth.

In order to accomplish the objective of establishing and developing a unified mass transit system under County ownership, the Board of County Commissioners enacted Ordinance No. 60-23 creating the Metropolitan Dade County Transit Authority as an agency of the County government, with exclusive jurisdiction in respect to the operation and maintenance of all transit systems acquired by the County subject to policies established by the County Commission. On May 17, 1961, the County agreed to purchase the bus transportation system owned by W. D. Pawley through the purchasing of all of the capital stock of four transit companies for an agreed purchase price of $7,705,274. This purchase price was to be paid through the use of revenue bonds of the County, issued in part to Mr. Pawley, pursuant to a Trust Agreement, and payable only from net revenues derived by the County from the operation of its newly acquired transit system. Subsequent to the above agreement, a so-called Supplemental Agreement providing for deferment of payment of a part of the purchase price and an Agreement for Delivery of Possession of Transit System were entered into. By the latter agreement the County was granted the right, at its option, to take possession and become the owner of the transit system prior to the delivery of the revenue bonds.

In furtherance of its aim of securing a county-wide bus transit system, the Board of County Commissioners by

Ordinance No. 61-44 authorized the issuance of Dade County Transit System Revenue Bonds in the principal amount of $9,000,000, with interest not to exceed 5 percent a year, to provide funds for payment of the purchase price, construction of a central garage and office building, and to provide initial working capital for the County's operation of the transit system. In addition, the Ordinance authorized the execution of the Trust Agreement noted above, securing the payment of the revenue bonds.[2]

In view of these actions, the bus operators' union requested the County to (1) recognize said union as the exclusive bargaining agent for all county employees utilized in operating the transit system, (2) enter into a colective bargaining agreement covering these employees, and (3) to assume the existing collective bargaining agreement.

By resolution of November 21, 1961, the County Commission directed the County Attorney to institute appropriate litigation in order to secure judicial determination of the questions of law and matters of controversy raised by the Union concerning County recognition of the Union as bargaining agent for all transit employees and the proposed collective bargaining agreement. Pursuant to this resolution, complaint for declaratory decree was filed. The County sets forth therein that the established policy of the State of Florida prohibits any governmental entity from entering into a collective bargaining agreement with a labor union or negotiating with a labor union regarding wages, hours, and conditions of employment. Also placed

[2] The validity of the various contract documents and revenue bonds was upheld by the Circuit Court and affirmed by the Supreme Court of Florida in State v. Dade County, Fla. 1962, 142 So. 2d 79.

in controversy was the right of these employees to strike and the effect thereon of § 839.221, Fla. Stat., F.S.A.[3]

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[3] § 839.221, Fla. Stat., F.S.A.

Governmental officers and employees; prohibited participation in strikes or membership in organizations that assert right to strike against government employer

(1) No person shall accept or hold any office, commission or employment in the service of the state, of any county or of any municipality, who:

(a) Participates in any strike or asserts the right to strike against the state, county or any municipality; or

(b) Is a member of an organization of government employees that asserts the right to strike against the state, county or any municipality, knowing that such organization asserts such right.

(2) All employees who comply with the provisions of this section are assured the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a vocational or a labor organization.

(3) In the event that any public utility owned and operated by a private person, firm or corporation is taken over on or after May 1, 1959, by the state, a county or a municipality but in fact said person, firm or corporation maintains a substantial financial or operating control, said persons then employed or to be employed shall be excluded from the operation of this section.

(4) Upon the acquisition of any public utility system from a private person, firm or corporation by any state, county or municipal government, then and in that event the employees of such private person, firm or corporation other than executive or management staff, shall be eligible to be included in classified civil service and other benefit provisions and systems of that governmental unit."

By its answer, the Union contended that (1) the operation of the transit companies affects interstate commerce within the meaning of the National Labor Relations Act, and thus, the labor relations involved are subject to such Act; (2) its members are not eligible for the County Civil Service program; (3) under the provisions of § 839.221, Fla. Stat., F.S.A., the government acquiring the utility *is* empowered to bargain collectively *where the former owner maintains a substantial financial or operating control;* (4) the County is without standing to raise the question concerning the right to make a collective bargaining agreement; and (5) under § 839.221, Fla. Stat., F.S.A., the County cannot lawfully acquire or operate the transit system without a collective bargaining agreement.

On December 19, 1961, the Union filed with the National Labor Relations Board a charge of unfair labor practices. However, no complaint was issued by the Board which had the following to say in this regard:

> "We have concluded that in the present posture of the case the County is the employer of the employees who are or will be engaged in the operation of the transferred transit lines; that the statutory exemption in Section 2(2) of the National Labor Relations Act is applicable; and that the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion.
>
> "However, as you know, there is presently pending litigation in the Florida State Court between the parties which also raises questions as to the status of the transit lines employees and their right to engage in collective bargaining and to strike over terms and conditions of employment, under State law. The outcome of this litigation may conceivably have an impact on the unfair labor practices charge filed by the Amalgamated.

> "For that reason, and in order to permit a reexamination of the charge in the light of the final outcome of the State Court litigation and to avoid prejudicing the rights of the charging parties under the National Labor Relations Act's 6-month statute of limitations, the charge will not be dismissed at this time."

This determination was appealed by the Union to the District Court of the District of Columbia where the complaint was dismissed on the grounds of lack of jurisdiction over the subject matter. This decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit on June 13, 1963. Division 1267, Amalgamated Ass'n of Street, Elec. Ry. and Motor Coach Employees of America v. Ordman, 320 F. 2d 729 (D.C. Cir. 1963).

The Union has presented two points in its appeal: (1) The trial court erred in asserting jurisdiction, and (2) The trial court erred in holding that Florida law bars the County as transit employer from barganing collectively and immunizes it against strikes.

The County maintains that the circuit court correctly held that it had jurisdiction of the controversy, and in addition presents two points in its appeal: (1) The trial court erred in holding that Mr. Pawley maintains a substantial financial or operating control in the County transit system, and (2) The trial court erred in holding that the members of the bus operators' union who accepted employment as county employees would not be included in classified civil service and other benefits.

The Union's first point raises the question of federal pre-emption. The Union has maintained both in the state and federal courts that all jurisdiction on the question of the relationship of the Union to the County is in the federal system. Their position is buttressed by the pronouncement of the Supreme Court of Florida in Scherer & Sons, Inc. v. International Ladies' Garment Workers'

Union, Fla. 1962, 142 So. 2d 290. The court there reaffirmed the principle that where a situation is "arguably subject" to the prohibitions or protections of the Labor Management Relations Act, 1947 (Taft-Hartley Act, Title 29 U.S.C.A. § 141 et seq.), the National Labor Relations Board is the appropriate forum to initially determine the presence or absence of federal jurisdiction.

The chancellor held that the situation in the instant case was not "arguably subject" to the provisions of the Taft-Hartley Act. He clearly felt that the case came within the exemption provided in § 152(2) of this Act.[4]

As has been related, the Union filed a complaint in the controversy at hand with the National Labor Relations Board. The Board in its findings specifically found applicable the statutory exemption under § 2(2) of the National Labor Relations Act (quoted below as § 152(2) of U.S.C.A.). The Union has not met the burden of demonstrating error in the determination of the chancellor which was to the same effect. Thus, the question has been reduced to a supposed violation of *state law,* and a state court is free to determine questions involved. Upon these facts we think that the court had jurisdiction to proceed with the cause.

We turn now to the Union's second point—that the trial court erred in holding that Florida law bars the county

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[4] § 152(2) provides:

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

as transit employer from bargaining collectively and immunizes it against strikes. In the final decree the chancellor made findings on this issue. They are set out under numbers 3 and 4 at the beginning of this opinion, and are repeated here for clarity:

> "3. Plaintiffs are not authorized by law to enter into a collective bargaining agreement with defendants and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.
>
> "4. Plaintiffs are not authorized to recognize as lawful any strike directed against them and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause."

The chancellor also filed an extensive opinion in support of his final decree. We take the liberty of quoting extensively from that portion referring to the above-quoted findings:

> "Therefore, having carefully considered all of the evidence in the case and the applicable law, the legislative history of Florida Statute 839.221, the intent of the Legislature, as manifest by the language of this statute, those facts generally known to the public at the time of the enactment of the statute, constitutional, statutory, and case law prevailing at the time of the enactment of the statute, and the arguments of able counsel of the parties in this case, the Court has firmly concluded the following:
>
> "1. In the event the plaintiffs take over the bus companies upon the circumstances revealed by the evidence in this case, Florida Statute 839.221 would be inapplicable to any persons employed by the bus companies at the time of takeover. In other words, as the Court weighs the eivdence, Mr. Pawley 'maintains a

substantial financial or operating control' within the meaning of Sub-Section (3) of that statute. Further, such persons who may be employed for so long a period as Mr. Pawley continues to maintain that substantial control would likewise be excluded from the operation of 839.221.

"2. Unless clearly authorized to do so by the enactment of legislation, the plaintiffs would not be authorized and are not now authorized to enter into collective bargaining agreements, within the labor relations meaning of the term, with the defendants.

"3. Unless clearly authorized to do so by the enactment of legislation, the plaintiffs could not recognize as lawful any strike against the plaintiffs by the defendants. In other words, the statute would be inapplicable to the employees, but there could be neither collective bargaining nor strike.

"The Court will now discuss its conclusions, listed as 1, 2, and 3 above, and in that discussion will construe 839.221.

"Whether or not it is ever actively exercised, the majority bondholder maintains, through his trustee, substantial control—control at least equal to that of any elected or appointed official who may be involved in the operation of the buses. This substantial control—and I add, parenthetically, actually over the management company as well—is control maintained through the relationship of its trustee to certain individuals or organizations which themselves exercise substantial operating control. The control comes about through the method prescribed for appointment and removal of key figures in the operation.

"As to conclusions 2 and 3, you gentlemen are all familiar with the Miami Waterworks case. (26 So. 2d 194) The basic Florida Statute is recited in it. From

a reading of that case and a close study of that statute that we are now construing (F.S. 839.221 does not employ the phrase 'collective bargaining'), I am led to the conclusion that in Florida there can be no collective bargaining within the labor relations meaning of the term, and that there is no present authority for the plaintiffs to contract with the defendants.

"Florida law and, indeed, the undisputed law in every jurisdiction in this country, is that in the absence of clear, concise, direct legislative authority, unions and their members are denied the right to strike against the government, whether it be federal, state, county, or municipal. The profit system is missing in public employment, public employees owe undivided allegiance to the public employer, and the continued operation of public employment is indispensable to the public interest.

"The courts have said that as a general rule collective bargaining has no place in government service. The employer is the whole people. This is a government of law, not men. For the courts to hold otherwise than as I have just explained would be to sanction control of governmental functions not by laws but by men. Such policy, if followed to its logical conclusion, would inevitably lead to chaos.

"The defendants have urged throughout this case that in the event the control that is specified in Subsection (3) of the statute is maintained, that 839.221 actually is legislative authority to bargain collectively and to strike. Such is not the case. Authority to strike is not given by implication. Neither is the judiciary delegated the legislative authority to legislate the right to strike upon certain findings of fact before the judiciary. Neither is a private individual or a government corporation or a government entity, such as the Authority here, in position to grant or to

deny that right through the avenue of some contractual provision. This is the fatal void in the defendants' case in regard to collective bargaining and the right to strike.

"Florida Statute 839.221, not being applicable to the defendants, they are in the exact position as they were in before the statute was passed; that is, no right to bargain collectively, no right to strike, because the statute simply has no applicability to them. They are excluded from the provisions of it under such circumstances as we have in this case.

"Therefore, there is nothing for them to fall back upon. But most important, the format of this statute that we are construing is to set up certain disqualifications for employment within the state, county, or municipality. The statute is basically a prohibition against employing certain persons or certain classes of persons.

"To construe its inapplicability to the defendants as breathing some legislative authority in them to strike is to say that such could be done by indirection or inference, and such is not the law."

The Union urges that the Miami Water Works case (Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194, 165 A.L.R. 967), cited by the chancellor, is not applicable to the instant situation because the case dealt with government as employer in a venture in which there were no private investment or private control. The distinction is valid, but we do not think that its destroys the rationale of the chancellor's opinion. The chancellor correctly found that the Transit Authority was an instrumentality of the metropolitan government. The nature of the "substantial financial or operating control" found by the final decree to repose in Mr. Pawley is

not such as to destroy the governmental character of the Transit Authority.

In support of a contrary conclusion, we are cited United States v. United Mine Workers, 330 U.S. 258, 67 Sup. Ct. 677, 91 L.Ed. 884 (1947). It is urged that the United Mine Workers' case stands for the proposition that to qualify for an exemption from the Norris-LaGuardia Act, the government must not only hold what amounts to full title and ownership of the enterprise in which it occupies the role of "employer", but in addition, must have "ultimate control." It is then urged that Florida should follow this construction in applying its own statute. We do not consider the Union's statement to be the holding of the cited case. It is clear from the facts stated that although utilizing the services of private managers, the Federal Government nevertheless had retained ultimate control. The holding, as we understand it, was that where the Government had seized actual possession of the mines and was operating them, the relationship between the Government and the workers was that of employer and employee. Thus, viewed, there is no conflict between the holding of the trial judge in the present case and that of the Supreme Court of the United States in the case cited. Nevertheless, we think it well to go a step further and point out that while there is no doubt that the record before us shows a substantial control in Mr. Pawley, still there is no evidence that he has the ultimate control over the transportation facilities involved.

Having determined that the circuit court had jurisdiction to enter the decree, and that the Union has not demonstrated error upon the court's application of the Florida law which prohibits collective bargaining by the strikes against the governmental entity, we must affirm the decree upon the appeal of Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America (No. 62-639).

The first point on the County's appeal challenges the court's finding that Mr. Pawley maintains a substantial financial or operating control in the transit system. The record contains abundant support for the chancellor's finding on this point.

The entire question of Mr. Pawley's financial and managerial control (or lack thereof) hinges upon his power to appoint and remove the trustees of the Dade County Transit System. This follows because (1) effectual managerial and financial control are in the hands of a management firm and a firm of consulting engineers, the approval of whose appointment by Mr. Pawley was both necessary and obtained; (2) prior to changing these two firms for others, approval of the trustees is required; and (3) Pawley can both remove and appoint the trustees at will. Therefore, through his power to control the trustees, Pawley has a substantial control of the transit system through the management firm and the consulting engineers.

The County's second point remains for consideration. Such point urges the trial court erred in holding that the members of the bus operators' union who accepted employment as county employees would not be included in classified civil service and other benefits. The chancellor's findings upon this issue are found in paragraph "2" of the portion of the decree quoted at the beginning of this opinion. They are as follows:

> "2. Plaintiffs are not required by law to offer employment to the members of the defendant union, and the members of the defendant union would not by operation of law (Sub-Section (4) of F.S. 839.221) be included in classified Civil Service and other benefit provisions and systems of Metropolitan Dade County, Florida, upon consummation of the contractual transaction evidenced by the record in this cause."

By virtue of his finding that the defendant union and its members are excluded from the operation of § 839.221, Fla. Stat., F.S.A., the chancellor excluded the members of the union from the benefit of subsection (4) thereof. (See footnote [2] for the section in full). Subsection (4) is as follows:

> "(4) Upon the acquisition of any public utility system from a private person, firm or corporation by any state, county or municipal government, then and in that event the employees of such private person, firm or corporation other than executive or management staff, shall be eligible to be included in classified civil service and other benefit provisions and systems of the that governmental unit."

The chancellor's conclusion is supported by the provision of Subsection "(3)" of § 839.221 which specifically says that where there is substantial private control the whole section shall be inapplicable.

But does the inapplicability of subsection "(4)" mean that these County employees cannot have the benefit of the County employees' classified civil serivec and other benefits of County employment? We do not so read subsection "(4)". The subsection directs that the employees of certain public utility systems shall be eligible for classified civil service. It does not by its terms prohibit the present union members from becoming eligible if they are by other provisions of law eligible. The Larger Counties Civil Service Law, Chapter 30255, Acts of 1955, Laws of Florida, as amended, (Article IV, Division 2 of the Code of Metropolitan Dade County), creates a civil service system in each county having a population of more than 450,000, and provides that:

> "The classified service to which this law shall apply shall comprise *all positions in the county service* existing on January 1, 1956 or thereafter established except

the following: "(Thereafter follows an enumeration of the 23 county positions and employees excluded from the classified service)" [Emphasis supplied].

Thus, all County employees in Dade County are required to be in the classified service (civil service) except those specifically excluded therefrom. No exclusion or exemption is made for personnel in positions which would be engaged in work necessarily incident to the operation of the County-owned transit system.

Moreover, the Metropolitan Dade County Transit Authority Ordinance (Ordinance No. 60-23), a local legislative enactment which the Supreme Court of Florida (in *State* v. *Dade County*, Fla. 1962, 142 So. 2d 79) held the County Commission was lawfully empowered to enact, expressly provides:

> "Section 2-164. Rights of Employees of Transit Systems Acquired by County.
>
> "Whenever the county acquires existing transit systems or facilities from a publicly or privately owned public utility, to the extent necessary or feasible for the economic operation of such facilities, all of the employees of such acquired transit system whose duties pertain to the facilities acquired shall be employed in comparable positions in the county service and the pay status, seniority, vacation and sick leave rights shall be preserved and maintained to the fullest possible extent. All employees of the authority shall be deemed, considered or construed as county employees and shall be entitled to all the rights, privileges and benefits of county employees."

Furthermore, Section 4.05 of the Home Rule Charter of Government for Dade County, Florida, provides, in part, as follows:

> "A. The Board of County Commissioners shall establish and maintain personnel and civil service,

retirement, and group insurance programs. The personnel system of the county shall be based on merit principles in order to foster effective career service in county employment and to employ those persons best qualified for county services which they are to perform.

• • •

"C. Except as provided herein, Chapter 30255, General Laws, 1955, as it exists on the effective date of this Charter, shall remain in effect until amended or changed by ordinance of the Board of County Commissioners adopted by two-thirds vote of the members present after recommendation from either the Personnel Advisory Board or the County Manager."

In addition, Chapter 122, Florida Statutes, provides for a compulsory retirement system for all state and county employees, and requires the county to deduct six percent from each salary check of every county employee for payment into the State and County Officers and Employees Retirement Fund. The provisions of this general law are applicable to all employees of Dade County, including those employed by the County in connection with the operation of the county-owned transit system.

Consequently, all persons who become employees of Dade County, whether they are members of the Bus Operators Union or not, immediately become compulsory participants in the state and county retirement program.

We therefore hold that paragraph numbered "(2)" of the final decree is erroneous, and upon remand the chancellor is directed to enter an order amending the final decree by striking therefrom said paragraph and entering an amended provision in accordance with this opinion. The chancellor may in his discretion take additional testimony and evidence as he finds necessary to enter an appropriate declaration of the rights of the parties upon the issue of

the rights of the union members to classified civil service and other benefits.

Affirmed in part and reversed in part and remanded.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. IN CHANCERY.

No. 61C 12832—Eaton

DADE COUNTY, a political subdivision of the State of Florida, et al., *Plaintiffs,*

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, a labor union organization, et al., *Defendants.*

Final Decree

THIS CAUSE came on to be heard upon plaintiffs' complaint for declaratory decree and for injunctive relief and the answer filed thereto. The prayer for injunctive relief has been withdrawn by plaintiffs. The Court has considered the evidence in the cause and has heard and considered the testimony and argument of counsel.

Therefore, this Court ORDERS, ADJUDGES and DECREES by way of declaratory decree that:

1. From the testimony presented and the documentary evidence presented, this Court finds that in the event the plaintiffs take over the public utility (pursuant to contract in evidence in this cause) now owned and operated by private person, firm or corporation, said person, firm or corporation will maintain, based upon circumstances presently reflected by this record, a substantial financial or operating control. Therefore, the defendant union and its members are excluded from the operation of F.S.

839.221 (and the plaintiffs are not barred from employing the membership of the defendant union).

2. Plaintiffs are not required by law to offer employment to the members of the defendant union, and the members of the defendant union would not by operation of law (Sub-Section (4) of F.S. 839.221) be included in classified Civil Service and other benefit provisions and systems of Metropolitan Dade County, Florida, upon consummation of the contractual transaction evidenced by the record in this cause.

3. Plaintiffs are not authorized by law to enter into a collective bargaining agreement with defendants and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.

4. Plaintiffs are not authorized to recognize as lawful any strike directed against them and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.

5. Those proceedings had before the Court on January 2, 1962, and the oral conclusions reached and announced in open court on that date shall be and hereby are made a part of this final decree. Those remarks classified as observations and dicta are specifically excluded from the final decree.

6. Costs of these proceedings to be assessed and taxed upon appropriate motion.

DONE AND ORDERED in Miami, Dade County, Florida, this 4th day of January 1962.

JOE EATON
Circuit Judge

Copies of the above order were mailed to attorneys of record on the date of entry thereof.

W. DELOACH

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
IN CHANCERY

No. 61C 12832—Eaton

DADE COUNTY, a political subdivision of the State of Florida, *et al, Plaintiffs,*

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, a labor union organization, *et al, Defendants.*

Opinion

Dade County contracted with the owner of a public utility to purchase the public utility, a bus system. The County contracted with a private "management company" to manage the system. The bus drivers employed by the utility company at the time of the execution of the contract to purchase were and are members of a labor union that asserts the right to strike against the government. Dade County brought a complaint for declaratory decree and, pursuant to the contract to purchase, gave notice to the seller of "take over" of the bus system. The County seeks to have the Court determine its rights, status, etc., under 839.221 Florida Statutes.

The following is the opinion of the Court:

One of the prayers in the plaintiffs' complaint reads as follows:

> "4. That the Court will construe and apply the provisions of Section 839.221, Florida Statutes, in the light of the several agreements described herein and declare, determine, and adjudicate the rights, status, powers, duties, and responsibilities of the respective parties thereunder."

You can readily see that a declaratory decree rendered on that prayer cannot be concisely given. One cannot declare the rights that are fertile here for declaration without spending considerable time in doing so.

Those persons, gentlemen, who are superficially acquainted with the subject matter of this case are in position to treat it summarily. Prejudice for one side or the other is a great time saver. It allows one to reach a decision without the trouble of having to become completely acquainted with the facts and the law in the case; but the impartial finds it almost unavoidable that the matter be belabored to a degree, because it is that complex, gentlemen.

Plaintiffs in this case sought injunctive relief and declaratory decree. The prayer for injunctive relief has been withdrawn by the plaintiffs.

At the outset, it should be made clear that declaratory relief is available only when there is a present need for declaration and that declaration may deal only with a present ascertainable state of fact. Such decree can be had only when there are those before the Court who have an antagonistic interest in the subject matter, whether in law or in fact or both. In other words, there must be a bona fide dispute as to a present justiciable question in order to invoke declaratory relief.

The plaintiffs here are in genuine doubt as to their rights, status, immunity, power, or privilege in the subject matter, and they are entitled to have those doubts removed; but a seriously debatable jurisdictional question has been raised in this case. This Court's decree, therefore, will be limited to a construction of that state statute which has been under such close scrutiny here (the Court clearly has jurisdiction to do that) and to a resolution of such doubts presently entertained by the plaintiffs as may be resolved without invading the jurisdiction of the NLRB or the federal courts.

I shall not relate the facts of this case. They are well known to the parties. Suffice it to say, the parties here declared an armistice at a time subsequent to the filing of the complaint in the cause. There can be no armistice without controversy.

Further, the state of armistice is to prevail only until such time as this Court renders its decree, which act is imminent. Whether or not the plaintiffs' notice of takeover of the bus system was revoked by the plaintiffs' armistice agreement or whether it will be automatically revitalized by the entry of the court decree is not for me to decide. Such question is not before me. Neither is the party who has contracted to sell the bus system. But the recent giving of that notice by the plaintiffs makes this matter ripe for judicial declaratory decree. Such a decree will be rendered within the jurisdictional limitation already detailed.

What precisely are the doubts presently entertained by the plaintiffs?

Under the facts present, the plaintiffs are in genuine quandary as to whether or not 839.221 of the Florida Statutes is applicable to such employees now working for the bus companies which it plans to take over who are members of the defendant union, which union asserts the right to strike against the County. The plaintiffs are not certain whether or not they may lawfully employ such union members. They are not certain whether or not they must offer such union members employment upon takeover. Indeed, they are in doubt as to whether or not such bus company employees will become entitled by operation of law to such benefits as may be said to flow to those in the County employment who are under Civil Service provisions. There is dispute as to whether or not the plaintiffs may be compelled to bargain collectively with the Union upon takeover. The plaintiffs are in doubt as to whether or not a strike by the Union membership may be lawfully directed against them following takeover.

In short, upon their venture into the bus business, they need an interpretation of 839.221. They need to know what effect that statute may have upon this venture that they are apparently about to undertake. The effect of that statute may be decreed upon consideration of the evidence now—and I emphasize "now"—before the Court, and the law applicable thereto.

These doubts will be resolved by this decree. Theoretical doubts will not be resolved. Most important, doubts concerning the relationship now or in the future between the defendants and individuals or management corporations not before this Court cannot here be reconciled, nor put to rest. This Court has no jurisdiction over the persons or the subject matter in that regard.

Therefore, having carefully considered all of the evidence in the case and the applicable law, the legislative history of Florida Statute 839.221, the intent of the Legislature, as manifest by the language of this statute, those facts generally known to the public at the time of the enactment of the statute, constitutional, statutory, and case law prevailing at the time of the enactment of the statute, and the arguments of able counsel of the parties in this case, the Court has firmly concluded the following:

1. In the event the plaintiffs take over the bus companies upon the circumstances revealed by the evidence in this case, Florida Statute 839.221 would be inapplicable to any persons employed by the bus companies at the time of takeover. In other words, as the Court weighs the evidence, Mr. Pawley "maintains a substantial financial or operating control" within the meaning of Sub-Section (3) of that statute. Further, such persons who may be employed for so long a period as Mr. Pawley continues to maintain that substantial control would likewise be excluded from the operation of 839.221.

2. Unless clearly authorized to do so by the enactment of legislation, the plaintiffs would not be authorized and

are not now authorized to enter into collective bargaining agreements, within the labor relations meaning of the term, with the defendants.

3. Unless clearly authorized to do so by the enactment of legislation, the plaintiffs could not recognize as lawful any strike against the plaintiffs by the defendants. In other words, the statute would be inapplicable to the employees, but there could be neither collective bargaining nor strike.

The Court will now discuss its conclusions, listed as 1, 2, and 3 above, and in that discussion will construe 839.221.

Whether or not it is ever actively exercised, the majority bondholder maintains, through his trustee, substantial control—control at least equal to that of any elected or appointed official who may be involved in the operation of the buses. This substantial control—and I add, parenthetically, actually over the management company as well—is control maintained through the relationship of its trustee to certain individuals or organizations which themselves exercise substantial operating control. The control comes about through the method prescribed for appointment and removal of key figures in the operation.

As to conclusions 2 and 3, you gentlemen are all familiar with the Miami Waterworks case. (26 So. 2d 194) The basic Florida Statute is recited in it. From a reading of that case and a close study of that statute that we are now construing (F.S. 839.221 does not employ the phrase "collective bargaining"), I am led to the conclusion that in Florida there can be no collective bargaining within the labor relations meaning of the term, and that there is no present authority for the plaintiffs to contract with the defendants.

Florida law and, indeed, the undisputed law in every jurisdiction in this country, is that in the absence of clear, concise, direct legislative authority, unions and their mem-

bers are denied the right to strike against the government, whether it be federal, state, county, or municipal. The profit system is missing in public employment, public employees owe undivided allegiance to the public employer, and the continued operation of public employment is indispensable to the public interest.

The courts have said that as a general rule collective bargaining has no place in government service. The employer is the whole people. This is a government of law, not men. For the courts to hold otherwise than as I have just explained would be to sanction control of governmental functions not by laws but by men. Such policy, if followed to its logical conclusion, would inevitably lead to chaos.

The defendants have urged throughout this case that in the event the control that is specified in Sub-Section (3) of the statute is maintained, that 839.221 actually is legislative authority to bargain collectively and to strike. Such is not the case. Authority to strike is not given by implication. Neither is the judiciary delegated the legislative authority to legislate the right to strike upon certain findings of fact before the judiciary. Neither is a private individual or a government corporation or a government entity, such as the Authority here, in position to grant or to deny that right through the avenue of some contractual provision. This is the fatal void in the defendants' case in regard to collective bargaining and the right to strike.

Florida Statute 839.221, not being applicable to the defendants, they are in the exact position as they were in before the statute was passed; that is, no right to bargain collectively, no right to strike, because the statute simply has no applicability to them. They are excluded from the provisions of it under such circumstances as we have in this case.

Therefore, there is nothing for them to fall back upon. But most important, the format of this statute that we are

construing is to set up certain disqualifications for employment within the state, county, or municipality. The statute is basically a prohibition against employing certain persons or certain classes of persons.

To construe its inapplicability to the defendants as breathing some legislative authority in them to strike is to say that such could be done by indirection or inference, and such is not the law.

At this point I think it important that the act that we are actually construing is found in the general laws of 1959, the original act. It is very important to note that in the Florida Statutes Annotated the word "section" is used in Sub-Section (3). In the act the language is, "shall be excluded from the operation of this *act*."

To further construe the statute, pursuant to the plaintiffs' prayer for declaratory decree, Sub-Section (4) is not applicable to the defendants because the statute is not applicable to them. For clarification, however, it is obvious to the Court that (4) was enacted for the purpose of providing for the inclusion of former bus company employees in the retirement programs in the event the County should acquire a public utility system, as distinguished from taking one over with substantial control remaining. Precise legislative authority is needed to accomplish that purpose.

The people that administer these retirement programs have actuarial programs to consider. Before a group of employees is eligible, there must be some legislation on the subject. This is that authority, (4), if a county acquires a bus system, as distinguished from taking one over.

There seems to be no conflict as to the meanings of Section 1 and Section 2 of the statute.

It appears to this Court that the act here being construed, rather than being a document of confusion, as some would make it, is a demonstration of rather unusual

foresight on the part of the Legislature as a whole. The act, though not so clear and unambiguous as to remove its interpretation from the area of declaratory decree, is not difficult to construe, and this Court is confident that the following general construction of the statute is in clear accord with the legislative intent.

First, we must note the distinction between the words "upon the acquisition of" and "is taken over by a county but, in fact, said person maintains a substantial financial or operating control."

You gentlemen may remember that I asked you if you thought there was any distinction there. To acquire in the law is to get as one's own. To acquire something is to possess and control a property acquired. "Acquired" means something vested, not mere possession.

The language used in (3) described a situation where possession has been had by the purchaser, but complete control has not been had. In other words, (3) anticipates that in a substantial control situation, which you have here, there must be federal recourse available to the bus company employees against the substantial control entity. The Legislature of Florida recognized that it cannot legislate away the impact of the statutes passed by the Congress and it recognized that the courts of law have no jurisdiction to do so.

The Legislature knew that there would be no method of preventing access to the federal agencies and no control over the federal courts, hence the language of Sub-Section (3).

Interestingly enough, the very language of Sub-Section (3) is in striking similarity to federal cases and reports of federal agencies which deal with situations where government-operated activities are conducted with substantial control remaining in private employers. The long recognized test on the question of who is the employer is known as the common law control test.

This is the general statutory construction that I am giving you, gentlemen. The Legislature recognized that it is entirely conceivable that a union and its membership may not be in position to strike against the government but may be in position to assert certain rights under federal law against the substantial control interest. The Legislature recognized in passing (3) that an employee not in position to strike against or to bargain collectively with its governmental master may nevertheless find himself in position to resort to federal recourse against certain supervisory or executive personnel not government employees. It recognized that former public utility employees might be in position to seek federal recourse for mutual aid or protection, absent matters not involving budgetary control. Example: Grievances against such supervisory and executive personnel. In other words, it was the intent of the Legislature that Florida Statute 839.221 be applicable in a situation where government acquires; that is, possesses and completely controls the operation of a utility.

In that instance employees may not belong to organizations which assert the right to strike against the government and may not themselves assert such right. That class of employees is eligible for Civil Service benefits. That is what the statute says. That is exactly what it says, absent (3).

Conversely, where substantial control remains, the County may, because the act is not applicable, employ former employees of a utility company, notwithstanding their union membership, because the act is not applicable to them—and notwithstanding their assertion of the right to strike. This gives them no right to strike against their government because they did not have it before the passage of the statute, but it leaves them in a position to seek federal redress, if such is warranted, against individuals or corporations that may be held, in federal jurisdictions, to be, in fact, their employers.

I think in that connection, gentlemen, that it is important that we read something else from the original statute which is not present to the naked eye in Florida Statutes Annotated. You will notice that in Section 1 it says, "No person shall hold office, employment," et cetera, "who participates in any strike or asserts the right to strike against the state, county or any municipality."

From reading Florida Statutes Annotated, the inquisitive individual construing the statute says, "Does that mean any strike—or does that mean any strike against the government?"

The answer is very simple. The title of the act, the original act, reads as follows: "An act relating to membership," et cetera, "in organizations asserting the right to strike, providing for the prohibition of participation in any strike against the state, county, or any municipality."

Although wholly owned government corporations or "authorities" are exempt under the NLRB's employer definition, government contractors are not exempt, even when they are operating a government-owned business and working with government-owned equipment. The contractor and not the government may be the employer if, in fact, the contractor controls personnel and certain labor relations, even though the government may screen the key or supervisory workers.

Under the contractual relationship between Mr. Pawley and Dade County, between Dade County and the management corporation, and upon the evidence presented here, employees not members of the management corporation would be employees of Dade County, but whether or not for some purpose they may ultimately be held in some other forum to be employees of the management company or the substantial control entity is not for the Court to know. Neither is it for me to speculate upon that.

Possibly the earliest account of such a situation in NLRB history has to do with the Cosmopolitan Shipping Com-

pany in 1937. It was held there that the United States Government in turning over operation and management of government-owned vessels to a private company while contracting to pay actual costs and expenses of the operation had avoided the responsibilities of the employer, of being an employer, and that the exemption of the government from the operation of NLRB was not meant to apply in cases of a commercial venture of that nature.

In 1943 a company known as the Copolymer Corporation, organized for the operation of a government activity, a government-owned plant, under an agreement with an agency of the United States Government, was held to be an employer within the meaning of the act, where there was nothing in the contract between the company and the government agency which rendered the labor relation of the company, other than those pertaining to supervisory employees, subject to the agency's control.

A similar situation was present and an identical ruling was made in 1951 upon a contract involving the Great Southern Chemical Corporation. However, as I say, whether or not the company contracting with the governmental unit may be an employer or, at least, jointly so with the government, within the meaning of the act, turns upon the particular factual circumstances present in each case. There is nothing before this Court on that proposition and no presently justiciable issue—and the management company is not a party to this case.

Further construing the statute in a general vein, it was, of course, not the Legislature's intent that former public utility employees automatically occupy the status and enjoy whatever benefits flow to public employees. The members of the defendant union will not, of course, automatically become government employees upon takeover.

Whether the statute is applicable or not, the one that we are construing, the employees of the former utility com-

pany must first choose to become County employees. In a situation where the company itself is acquired within the language of (4), the County must consider the employees eligible for Civil Service benefits.

Of course, the Legislature cannot legislate that a citizen must go to work for the government (that proposition was taken care of in the 1780's in America by a document known as the Constitution of the United States) save, of course, in national emergencies.

Neither can A and B contract that A will sell and B will purchase the manual services and labors of a third person. That proposition was abrogated shortly after a terrible internal conflict, sometimes referred to as the Civil War and sometimes referred to as the War Between the States, depending upon what part of the country one occupies. In other words, it cannot be done contractually, gentlemen, not since the War Between the States.

Having made findings of fact, having construed the statute, and having rendered conclusions of the Court on doubts sought to be resolved by the plaintiffs' prayer for declaratory decree, the Court now makes certain observations which must be considered purely as such. They are dicta at best.

The Court recognizes full well that its function is not to encourage or to discourage the passage of legislation, not to encourage or discourage the resort to federal boards or jurisdictions, the government operation of public transportation facilities, membership or resignation from unions which assert the right to strike against the government. Its function is not to seek public acceptance of its judgments and decrees. Its function is to stay within its prescribed judicial orbit.

In this instance, it is to resolve bona fide doubts and to construe a statute. I pause here to quote from Justice Brandeis, words which were written forty years ago,

which I think are appropriate: "All rights are derived from the purposes of the society in which they exist. Above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community"—and this is the point I make—"but it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the Legislature, which while limiting individual and group rights of aggression and defense may substitute processes of justice for the more primitive method of trial by combat."

The Court considers, then, the following remarks appropriate in that their purpose, as I say, is to assure the parties here of an understanding of the construction of the statute. They are made only for that purpose and, are no more than observations.

The Court observes that the Legislature anticipated that a county may, as the Transit Authority Chairman expressed it, except and hope that bus company employees who are members of a union that assert the right to strike would accept county employment. In other words, if substantial control exists, the Legislature very wisely made this statute inapplicable to the bus drivers employed at the time of the takeover or to be employed. The Legislature anticipated that if the statute was inapplicable to those employees, the county would be in position to decide what course to take. I have gone to great pains to say to you that it is none of the Court's business what the County does, but the discussion, in my judgment, clarifies the construction of the statute.

The County could do one of several things: It could employ the present bus drivers, should they consent, of course, realizing that there would be no right to strike against the county or to bargain collectively, but employing

them with the knowledge that union members might some day seek some recourse against this substantial control entity in the area of the federal law; or, B, delegate the right to the Transit Authority to enter into contractual agreement with them (not collective bargaining within the labor sense), such agreement to be within budgetary limitations, timewise as well as dollarwise; or, C, Statute 839.221 being inapplicable and no legislative roadblock as to these particular employees, the County may be in position to consider the advisability or lack of it of specific legislative grant in the area of collective bargaining, including or excluding the right to strike; or, D, it may operate the buses through drivers not associated with a union which asserts the right to strike.

It may choose its own employees. The Legislature anticipated all this in the drafting of this statute, which is clear and easy to read.

Interestingly enough, whether this Court holds that there is or there is not substantial control in this instance would be of little or no consequence in any federal proceeding. Such a ruling here serves the purpose of settling the rights of the County, if it wishes to do so, to employ personnel belonging to a union which asserts the right to strike against the County. Whether or not the employee works for the County, as I have said, is up to him and up to the County under this statute and under this factual situation.

I think it is appropriate to note that the maintenance of substantial control in a circumstance such as ours is not unusual in bond proceedings. State and county governments by constitutional provisions must operate on a balanced budget. These bond agreements and programs are ofttimes helpful to a community as a practical matter. There must be some control to cope with the problem of the natural urge of officeholders to satisfy their conconstituents. Example: The urge to reroute a bus six blocks off its beaten path to the benefit of a few con-

stituents; the urge to hire more employees than are necessary to be hired for patronage purposes, et cetera. This Court merely holds that such a relationship renders the statute inapplicable as to a certain class of employees.

I want to make it clear that the Court is not deciding questions regarding the scope or application of County Civil Service regulations. It is not deciding questions regarding the scope or application of County retirement programs. It is not deciding questions relative to rights or status of the parties should the County take over and find at a later time that Mr. Pawley has negotiated bonds so as to become a minority bondholder. Those questions have not been raised. They are not presently justiciable.

In summary, gentlemen, (still observations), Dade County may choose to acquire a public utility, vest the control in elected officials, and operate a public utility free from labor relations problems; or it may take over such a utility by contract, with some substantial control remaining in the seller. It may choose to contract with management companies to manage the utility, thereby enjoying the benefits of such arrangement, and also, thereby, living with whatever inconveniences may develop, because state and county governments cannot deprive American citizens of their right to resort to federal boards and courts given them under the authority of the United States Congress. In any event, the people (and that term includes members of the union), the named defendants, and the elected representatives of the people themselves, each has his choice to make under this statute.

It is the prayer of this Court that the choices are wisely made to the benefit of the community as a whole.

JOE EATON
Circuit Judge
8 Jan 62

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
IN CHANCERY

No. 61C 12832—Eaton

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida, *Plaintiffs*,

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, a labor union organization, *et al.*, *Defendants*.

Order Denying Petition for Rehearing

THIS CAUSE came on to be heard on January 29, 1962, upon defendants' petition for rehearing. The Court considered the petition and heard argument by counsel for the parties. Therefore, having been advised in the premises, it is

ORDERED, ADJUDGED and DECREED that:

1. Defendants' petition for rehearing be and the same is hereby denied.

2. Oral ruling and oral opinion upon the completion of oral argument by the parties on January 29, 1962, be and the same are hereby made a part of this order denying petition for rehearing.

DONE AND ORDERED in Chambers, Miami, Dade County, Florida, this 30th day of January 1962.

JOE EATON
Circuit Judge

Oral Ruling and Opinion

THE COURT: The defendants' petition for rehearing is denied.

Gentlemen, in that connection, let me point out to you that fine distinction about which we are talking. In the first place, we have got to remember that we are doing nothing more than construing a state statute, as you say.

Now, this statute is not an anti-strike statute. This statute says that certain people can be employed and certain others cannot be employed. This is the entire statute that we were talking about. It does not deal with the proposition of who can strike and who cannot strike.

From a reading of that statute, although there is substantial control—and this does not mean primary control, does not mean overreaching control, it does not mean more control than the County has. It means something substantial, something more than an illusory proposition, something of substance. It does not mean he has complete control or any percentage of control. It just means he has some.

As an aside, if he did not, he would be a fool, and Mr. Pawley is not a fool.

Of course, my ruling is on the basis of this hearing and not on that observation. However, take Mr. Ed Ball as an example, why the County cannot raise the fare on the Rickenbacker Causeway. Mr. Ed Ball has got to approve that, but those people that work down there are not employees of Mr. Ed Ball's. They are employees of the County.

When you begin to tie in the substantial control ruling as having something to do with striking or not striking—in interpreting that particular statute just for statutory construction is what I am talking about—then people make a serious mistake.

Here is the distinction in the cases that you point out and our instant case: In the first place, the principal reason that this matter is presently justiciable is this: The pleadings say that the Union and the County were in a position, before takeover, before notice of takeover, just by virtue of the Union having been invited to come over and go to work, to have to decide what their initial employment arrangements were to be.

The Union said, "We can bargain collectively with you." The County said, "No. you can't." Now, regardless of whether the notice was ever sent out, whether the County ever takes over or not, that situation makes this presently justiciable. This was not present in any of these cases about which you are talking.

The reason that the Union could not and the County could not bargain collectively—and when I say "not" now, I am talking about this answer to this judicial decree to this complaint that was filed—was that as of the time the controversy arose, the County certainly could not bargain collectively with the Union because of the law with which we are familiar. The Miami Water Works case is the first, and because there is no legislative authority for it to do so and certainly that statute having to do with employment rights did not give them any authority to bargain, so they could not bargain.

Then you say, "But they can because the County has divested itself of its sovereignty."

It has not, for the purposes of construing this statute and to rule on the presently justiciable controversy. It can only divest itself of its sovereignty in the actual operation of a bus company.

That is what gave rise to all of my rulings about what could happen in the actual operation of the company. The presently justiciable situation does not have to do with the actual operation of the bus company.

The only reason that I put all that stuff in there at all about the federal situation was this: The County wants an interpretation of this statute. If I simply say to the County, "You cannot bargain collectively and leave it there, then I have misguided the County by way of declaratory decree, so I add, in order to put at rest their rights and immunities, that depending upon the actual operation, if they ever take over and when they start to operate, then all of these propositions that you are talking about may well come into play.

I have pointed out throughout my opinion that at least it could be said that the management company and the County jointly employ these people, but that depends upon the actual operation of the business. All of these cases have to do with a relationship that comes about operationally.

Here is the position the bus driver is in: He is invited to come to work for the County. This statute—and all I am doing is construing the statute—says that because there is this substantial control, he can have and still keep this union membership. That is all this statute says.

When he does, he immediately becomes a County employee. There is no question about it.

In the case involving the Pentagon, the National Food Corporation case, and in the Cosmopolitan case— Incidentally, the company there received three per cent of the gross revenue. The company did the actual hiring of employees. That Cosmopolitan Company hired them.

In the case in Washington, D. C., in the Pentagon, National Food actually hired them.

In this case, why are they County employees? Because the County sends them out a bunch of material and says, "Come to work for us," notwithstanding Mr. Reynolds' statement that they were looking to the management company for the employees. All of the other evidence bears out that the County had invited them to come over and

accept County employment. When they do that, they do not do that with knowledge of a contract between the County and the management company or with knowledge of a trust agreement. This is not a matter of record which puts them on notice as to who their employer is going to be. They come over, as distinguished from all of these cases we have been reading about, and say, "Here I am, I am a County employee." They then are County employees.

When the actual operation of this thing comes about, I have pointed out that it might well be, although it is not presently justiciable, and it is a federal proposition, that at least one of their employers would be the management company and that they would have all rights granted them under the federal law against an employer, namely, the management company.

I did not wish to anticipate every fact. I tried to stay within the framework of the agreement. I did say they were entitled to all of their recoure. I did go to the trouble to point out the title to this statute that we were construing, which makes it clear that this is a prohibition against joining a union and working for the County when that union asserts the right to strike against the County, but not when it asserts the right to strike against a management company.

The only fine distinction between your argument and my decree is this. Operationally, you may be correct. This is a declaratory decree. This does not anticipate facts having to do with the actual operation of the business. That is the first point. As a matter of fact, the County anticipated strikes because in its contract with the management company it talks about what will happen when there is a strike, if there is a strike.

The County anticipates that if there is a strike, that the County nevertheless will pay certain amounts to the

management company for a certain particular period of time.

Who is the strike against if there is a strike? The same entity that all of these cases talk about. The strike is against the actual employer, the supervisor.

These people in National Food did not strike against the government. They struck against National Food.

These people in Cosmopolitan did not strike against the United States Government. They struck against Cosmopolitan and the federal people said that the government cannot be heard to complain about that indirectly. It suffers the consequences of a strike against an employer. It has divested itself of that. It has assumed the position that strikes may develop against the actual employer and, therefore, it cannot be heard to complain—not that the strike was against it but that the people have struck against Cosmopolitan or that they have struck against National Food, no more than they can be heard to complain here if they ever take over that the Union strikes against the management company if, in fact, it is their employer.

The same as in all of these cases, and that is exactly what I say here.

Can the Union and the County bargain collectively? You say the County has divested itself of its sovereignty. It has not for that purpose because it takes some statutory authority for a county to bargain collectively.

In the California case, the statutory authority came about through a construction of a statute, but the statutory authority was the Railway Labor Act. The statutory authority in California in the bus case was the state statute.

In all instances there is some statutory authority to bargain as far as the county goes. There is none here. There is no federal statute.

There are many rulings that say in the operation of this function the government cannot be heard to complain about a strike against this fellow that is operating this business for him, even though it indirectly hurts the government. There are plenty of cases on that. That is what I pointed out in my opinion, but there is no legislative authority for these people to bargain collectively.

This statute simply is not that authority. It is an employment statute.

So you say, "Well, who does make these arrangements?"

There is no authority. You have not challenged the validity of the contract. The Union has not attempted to set aside the contract as being void against public policy or being an unconstitutional act, without charter or authority.

They said, "All right. If we come and go to work for you, we are County employees because we sign up with the County."

These contracts still remain because you have not attempted to set them aside.

How is this done as a practical matter? The same way it is to be done in all of these other cases. The County by contract anticipated there would be strikes, obviously, or, at least, anticipated the possibility of it. The County said to the management company, "You send us over the budget and we will approve it or disapprove it, but you prepare the budget, Mr. Management Company, and send it over here to me."

The County still gives a percentage of profit to the management company. There is the element of profit that you can work with.

The County says, "You send me over the budget."

If this County has to change its contract with the management company, it is fully authorized by the Constitu-

tion to contract with that company. The management company sends over the budget. The Union is bargaining collectively with its employer, namely, the management company.

The management company says, "Look, County, we are not making enough money this way. Three per cent is not enough. We have got to have prepared a higher budget here. These boys are wanting to take part of my three per cent or they're going to quit driving, they're going to strike against the management company."

The County says, "Well, I got to change my contract, but I guess I am going to have to give you five per cent."

The point is that although the County cannot bargain collectively, having absolutely no statutory authority, the management company, if it, in fact, in the operation of the thing is the employer, could bargain collectively and to adjust its situation with the County by contract.

There is no statutory authority for this County to bargain collectively. This is exactly what my ruling says throughout.

The only way you can construe the statute and not give the County the false information that there could never be any collective bargaining or strikes, which would affect it, is to go further and point out, as I have done, these federal cases that you are talking about, so that at least the statute would not simply say "You have full control over these people and there could be no bargaining or striking because these cases all say that there can be," and that is exactly what this opinion says.

The distinction between your argument and the situation in this case is these people do become County employees initially. There is no question about it. If they should go to work because they agree to it, they would be County employees. It is that simple. They come over there and say, "I am coming to work for you." At that time they

cannot strike against the County directly nor can they bargain collectively with the County.

However, if in the operation of this business they are, in fact, employed by the management company and if the federal people say so—and that is the important thing, because this Court does not have a right to make that determination—that is, a determination for the federal people—if they say so, of course, the County, though it may not bargain collectively, and it does not have to recognize a strike against it, would be in position to suffer the disadvantages, as I have pointed out, of having private enterprise direct and supervise the bus drivers, and, as a matter of fact, their very contract calls these people supervisors.

The test of who the employer is is who supervises under the federal law. It would seem to me that the County has anticipated this and has put in a strike provision as to what their relationship is with the management company. If they do not want the strike and the management company says that it would be to their great advantage to change the contract rather than you having to pay me the X thousands of dollars through the strike, the County is at liberty to contract with its management company.

There might be some question here as to agency or private contractor because if these management people were purely the agents of the County, they might be said to take on some of this immunity as an agent, but if, in fact, they are private contractors, then there is no such immunity available to them.

Again, this is for the federal people to decide and not for the state courts.

The only way you can cut it, a County does not have the authority, the people have not authorized this County to enter into collective bargaining agreements.

Why? Because there is no statute that says so. This one statute certainly does not say so.

As I have said in my opinion, if the County wants to operate these buses like Coral Gables does, they got the authority there to do that, and if they want to operate it through private enterprise and subject themselves to the possibility of strikes and collective bargaining with the private management company under the federal law, they have a right to do that because there are certain advantages to them and, likewise, certain inconveniences that flow, namely, some day somebody strikes against a management company and not the County because the federal people say the management company is a private contractor and the County has given up or divested itself of its employer relationship through the actual operation, as distinguished from these contracts, and then the County is in a position to do that, too, if it wants to do it.

That is what my opinion holds and those are the only distinctions that I see between your argument and my ruling.

Let me just do one or two other things while we are here. You see, the federal recourse is never against the government. The federal recourse comes about because of the employer-employee relationship, and the government is actually removed from the federal recourse, but when they get into business with management, the position that the government occupies comes about not only because it is in business but because of its relationship by choice to the actual employer, who does come under the federal statutes.

That is why I use the words "at least joint employers" somewhere in my opinion.

Here is another thing that the Legislature met when it passed this statute: This statute does nothing more than say to the County, and this is exactly what the legislative intent was, "You may employ certain individuals notwithstanding your knowledge of the fact that they will continue to belong to a union which asserts the right to strike

against the government. You do not have to, but if you do, you put yourself in the position of subjecting yourself to these inconveniences that I have pointed out, not because they can actually strike against you but because they may be held by the federal people to be in position to strike and bargain collectively with the substantial control entity or the management company here," so that when the County reads this statute and still employs members of the Union who assert this right, then they employ them with notice of these disadvantages that obviously are present and which they obviously anticipated.

The statute simply says to the County, "You can hire them, but you hire them with knowledge that they retain their rights under the federal law as a member of this Union."

They cannot say, "I do not assert the right to strike against the County," and then strike the management company because indirectly it is a strike against the County.

A union cannot be in a position to say, "Well, I will work for you and not assert the right to strike against you," and then strike the management company.

The County knows this. They do assert the right to strike against the County and they know it will inconvenience the County if they strike. Nevertheless, that does not give them the right to bargain collectively with the County or to strike the County directly.

That is exactly what notice this statute gave to the County. Their possession in the operation of this business is controlling as to who the employer is at the time they begin to function, if they ever do, with employees who are members of your union. This decree goes as far as it can to give the County its possession under the law, but not so far as to usurp the authority of the federal people, and the only distinction in your argument and this opinion is that you apparently take the position that this statute or

general statutory authority under the federal law gives the County the right to negotiate directly, to bargain collectively, for you to strike against the County directly. I say it does not and cannot, but that if in the operation of this thing the County does not occupy the employer relationship or does, in fact, at least jointly occupy it with private enterprise, that it does it with the notice of what the results may be and they have actually anticipated it to the point of putting into their contract certain strike provisions.

For those reasons, your petition for rehearing is denied.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, FLORIDA
IN CHANCERY

No. 61C 12832

DADE COUNTY, a political subdivision of the State of Florida, *et al., Plaintiffs,*

v.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, a labor union organization, *et al., Defendants.*

Order on Plaintiffs' Petition for Supplemental Relief

THIS CAUSE came on regularly to be heard upon plaintiffs' petition for supplemental relief, the defendants' motion to dismiss and response to plaintiffs' petition. The Court has heard and considered the testimony, evidence and arguments of counsel for the respective parties, and being otherwise duly advised in the premises, it is thereupon

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That defendants' motion to dismiss the plaintiffs' petition for supplemental relief is hereby denied.

2. The defendants' be and they are hereby enjoined and restrained from striking or continuing any strike for the purpose of coercing the plaintiffs or any other governmental agency to engage in collective bargaining.

3. The Courts oral comments (following the completion of the testimony) at to-days hearing be and hereby are made a part of this order.

DONE AND ORDERED in Chambers in Miami, Florida, this 2nd day of February, 1962.

JOE EATON
Circuit Judge

Oral Comments by the Court

The Court: I want to make a statement. I think it is time that it is said. I will give you my ruling for whatever it is worth.

The founders of this country of ours made it pretty clear that there were three separate branches of this government. One of them was the judiciary, it limited the authority of the judiciary to handle executive and administrative problems. This Court can only perform the function of a court. It cannot solve the problems between the Union and Mr. Pawley or the County and the problem of bus drivers and where they come from, and for a week now the Court has provided an avenue for both sides here to be able to say, "We don't know what we can do until after Friday." You are entitled, both sides are entitled to lean on the Court, to get whatever judicial determination the courts are authorized to enter. The courts do not have the authority to settle executive problems. Neither can they write contracts for labor unions with employees, and when it is put in the position of having presented to it the question of construing a statute and only construing a statute, when the statute is construed, that is all that a state court can do.

It cannot hire 750 bus drivers. It cannot require the entry of a collective bargaining agreement between a labor union and Mr. Pawley.

Now, Mr. Davis is entitled to have this matter considered by the Court and, as a matter of fact, for what it is worth, he is correct in this instance.

Here is the ruling on this situation, and, gentlemen, I do not want to appear to be pompous at all, but it seems to me that this proposition involved is so perfectly obvious that we have simply been providing the interested parties with an opportunity to write and make radio announcements and everybody has had a great opportunity now to figure out what is going to happen after Friday.

Nothing is going to happen after Friday that was not going to happen anyway, in my judgment. However, this is not to say that Mr. Davis does not have every right to present what he has presented because he does and I say he is correct. Here is the decision on this case, and I am not going to rule next week but I am going to rule now.

Gentlemen, when I am prepared to rule, I will say to you that I am now ruling. I will rule very slowly. I will say it one time, and I do hope that I make myself understood about it. I am not going to make the matter difficult because this matter is not difficult at all.

This Court—and I am not beginning the order yet because I will let you know when I am—began simply by construing a statute, which is all in the world it has a right to do under the federal law and under the state law. One side of the case took the position that Mr. Pawley maintains substantial control if there was a takeover under the contractual agreement. The other side said he did not.

Why is it necessary to rule on that proposition? Because whether the statute that I am construing is even applicable or not to the union men depends upon that one factor, and that is why this thing is injected into this case.

I have ruled prior to now that there is no authority, no clear legislative authority for a governmental agency in this state to enter into any collective bargaining agreement with a union or to recognize as valid a strike against it, but that because Mr. Pawley maintains that nominal control, that in my experience all principal bondholders maintain in bonding agreements, and it is not unusual, it is a natural and customary thing—that because he does, this statute which we were construing is not applicable to the members of this labor union because the very statute itself says that it is not. The result of that simply is that the County may, if it wishes, employ these union drivers, where it could not have done so had not Mr. Pawley maintained this substantial control.

The statute is simply a statute which prohibits government from employing anybody that maintains that it has a right to strike against it. Because of this circumstance, the County can employ these people, notwithstanding the face that they maintain a right to strike against the government, because in construing a statute the Court must determine the legislative intent.

The Court then went on to say what (3) means, why it is there, why this peculiar language is there.

It said simply, not deciding whether these people if they are ever employed by the County, working for the management company or Mr. Pawley or the County—not for that purpose because I make it clear that that determination must be made by the federal people, but simply to show why the statute is there and what the Legislature intended, I pointed out that the Legislature intended to leave these labor employees, if they wanted to work for the County and the County wanted to hire them, in position to assert whatever rights they may have under the federal law against any employer that the federal people may some day find to be their employer, in fact, whether jointly with the County or with the employer.

This Court is not in any position and has never ruled who the employer was going to be when these people actually go to work, if they ever do, for a management company or the County, Mr. Pawley. I tried to point out that is not within the jurisdiction of this Court at all. It is simply in describing the statute and determining the legislative intent that this idea comes into the opinion, and this is clearly a National Labor Relations Board or a Federal Court problem.

Now we get down to today. The law is clear that the state has extremely limited authority. We are discussing today state courts in this area.

The only time it has any authority at all to act is when there can be no argument at all as to whether this subject matter of this proceeding falls within the federal act. In my judgment, this is one of the few circumstances that clearly does not and could not fall within the federal act for this simple reason. There is no place, in my judgment, in the federal act, any language, any congressional intent that has to do with a situation where government, who does not operate any business whatsoever, that has to do with these members of this labor union, whether or not the labor union and the County, who does not employ them, for whom they do not have to go to work, the County not being their employers and not operating any industry that they are even remotely connected with—there is no provision in the national act that even remotely touches upon that peculiar set of circumstances.

It was not within the contemplation of the Congress that a government—and not because they are governments because I agree with you on your interpretation of the cases and pointed out to you fellows three or four weeks ago that counties have been held to be persons under that act, if you remember, not because they are government and not simply because there is no employee-employer relationship, but because the act is not designed at all to cover a

situation where a group of individual labor union people who work for Miami Transit Company are engaging in discussions with some governmental agency about what may happen someday if the government ever takes them over. This is not a part of the act.

This is one of the few situations that comes to my mind that is not arguably within that act.

For what it is worth, and as I say, this reminds me of the title to the Shakespearean comedy, "Much Ado About Nothing," frankly, the Union on January 27 adopted a resolution which said that one of its purposes in calling this strike was because of Dade County's refusal pursuant to said contract, combination and conspiracy, to recognize and bargain collectively with the Union as the representative of employees to whom the County is offering jobs.

This is not within this Court's jurisdiction because the strike is called for an unfair labor practice. That would seem to take it completely out of the Court's jurisdiction.

However, because that is a valid reason for a strike, and it is clearly recognized under the federal law as being an entirely lawful purpose, because that is—that does not mean that everything connected with the alleged unfair labor practice must necessarily be within the confines of the federal act because it is not, and because of the Union's statement in No. 5, the Respondent's Exhibit No. 5, that that is one of the many purposes, and I realize that it is in the context of being part of an alleged unfair labor practice—nevertheless, that is enough to give the Court that limited jurisdiction to restrain the Union as to that one particular circumstance.

This does not reach the strike itself. Those matters that are properly before the federal people, and relying upon the case that the County itself relied upon, and there are two or three that they cite there, and relying upon Mr. Davis' own statement, the most that this Court can do is

to restrain the defendants from engaging in any strike or concerted activity which has as its purpose the coercion of the governmental entity, the County, from entering into a collective bargaining agreement with the Union.

Now, that is the extent of the order. That is all that has been sought. It is so ordered.

To repeat it, the members of the Union, the defendants, are hereby restrained from engaging in any type of strike or concerted activity which has the purpose of coercing the plaintiffs into entering into a collective bargaining agreement with the defendants.

I point out that that is done, entered as of now, when Dade County is not the employer of these men, when they may never be the employer of these men, when there is not operative in any way any bus company under the direction of the County entity at all.

The Court has ruled that under those circumstances they cannot bargain collectively, one with the other, and, therefore, any strike which has as one of its purposes the ones stated here in Respondent's Exhibit No. 5 would be enjoined, and is so enjoined.

Mr. Davis, you will draw me an appropriate order on it, present it to me. We all understand that this does not make the buses run. It simply removes from the picture what this Court finds to be an illegal purpose and leaves the Union to all of the rights granted it by the federal congress under the labor act.

APPENDIX B

The Labor Management Relations Act, 1957, 61 Stat. 136, 29 U.S.C. § 141, *et seq.*, provides as follows:

Section 151. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce, by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by re-

storing equality of bargaining power between employers and employees.

Section 152. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

Section 153. (d) There shall be a General Counsel of the Board who shall be appointed by the President, by and

with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or has may be provided by law. * * *

* * * * *

Section 157. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * * .

Section 158. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

Section 159. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: • • • .

Section 160. (a) The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

• • • • •

Section 163. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.